Supreme Court, U.S.
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In The
Supreme Court of the United States

CHARLES MAYO ACREE, TWYMAN K, APPLEBY,BRENDA BARTLEY, CHARLES BENNETT, DONALD BENNETT, LOUIS K. BENNETT, JR., AUSTIN BINGHAM, CARL BROWN, DONALD BRUTON, WILLIAM F. BURKS, JR, ISAAC BUTLER, JOYCE CAPPS, EDWARD CLAYWELL, NYMAN CLAYWELL, CHARLES COFFEY, BOBBY DECKARD, EVA ROSE DECKARD, KENNETH DOUGLAS, CHARLES EATON, ROBERT EMBERTON, JERRY FRANCIS, TED GARMON, WILLIAM GARRETT, CURTIS GIBSON, CARLOS GREEN, DANIEL HARPER, WILLIAM HOUCHENS, ROBERT JONES, RICHARD LILE, MAXIE MARTIN, WILLIAM MARTIN, THOMAS MATTHEWS, JOYCE MORGAN, MICKEL MUSE, RANDAL PACE, NOEL PAGE, GENE PEDIGO, CHARLES RICH, CLEVELAN ROACH, LYNDAL RUTLEDGE, RAYMOND SHAW, JR., SELBY SHIRLEY, JACK SHOOPMAN, NILE SMITH, JOE SPEAR, DOUGLAS STEEN, JACKIE SULLIVAN, DAVID TAYLOR, and BILLY YOUNG,

Petitioners,

v.

TYSON BEARING COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Upon its "turnkey" purchase of a factory with 226 active hourly employees, the respondent instituted and enforced a policy whereby it paid 79 of its hourly workers $3.00 per hour less than all but a very few (six) of their co-workers.

The policy described the lower-paid workers as "retiree-applicants." They were employees who had elected to receive a pension benefit from the previous owner of the factory that respondent began operating on June 14, 1999. In order to be "retiree-applicants," employees had to be 55 years of age or have 30 years of service with the plant's previous owner.

Petitioners are a large group of these "retiree-applicants." They believe that the policy whereby respondent has paid them $3.00 per hour less than their co-workers since June 14, 1999, discriminates against them because of their age 40 years and over, in violation of the Kentucky equivalent of the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623, et. seq.

The central question in this case is this:

> Is a policy that by its express terms applies only to the disadvantage of employees age 46 and older (Kentucky law has long prohibited factory employment for those under age 16) per se discriminatory against those employees because of their age?

Some subsidiary questions are:

> Are there any special reasons why facially discriminatory policies are acceptable to the disadvantage of older workers, as opposed to members of other protected groups?

QUESTIONS PRESENTED FOR REVIEW – Continued

If facially discriminatory policies are ever acceptable generally, what defenses or justifications make make them acceptable?

Because this case was tried to a jury, there are also some procedural questions that the Court may want to consider:

Even if a facially discriminatory policy is not per se discriminatory, should a jury be permitted to find that it is discriminatory as a matter of fact because of its facially discriminatory nature?

Are age discrimination plaintiffs who proved that an employer's policy had a disparate impact upon them, to their disadvantage, at least entitled to a trial upon that theory where:

1. the court of appeals had affirmed a summary judgment against them upon the basis that disparate impact may never be a viable theory of recovery in an age discrimination case; and

2. the Supreme Court pronounced to the contrary in an opinion issued during the pendency of the plaintiff's appeal; and

3. the plaintiffs immediately brought the relevant opinion of the Supreme Court to the attention of the court of appeals?

Are age discrimination plaintiffs entitled to a new trial where the district court permitted an employer who enforced a discriminatory policy to defend upon the basis that the institution of the policy was the idea of the plaintiff's union, and:

QUESTIONS PRESENTED FOR REVIEW – Continued

1. The district court had properly ruled, prior to trial, that the employer was solely responsible for the discriminatory policy, and could not even prosecute a third party complaint against the union; and

2. The plaintiffs protested the employer's reliance upon this finger-pointing defense at every available opportunity?

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The decision below undermines an important purpose of the laws prohibiting discrimination in employment, which is to eradicate policies that overtly discriminate against any protected group, including that of individuals age 40 and over

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS AND ORDERS BELOW

The district court's opinion (per Russell, D.J.) denying the respondent's motion for summary judgment and the petitioners' cross motion for summary judgment appears at pp. 31a to 43a of the Appendix to this petition. The court's order reflecting this disposition appears at p. 44a.

The district court's opinion reconsidering its denial of respondent's motion for summary judgment upon petitioners' disparate impact claim and granting the same appears at pp. 45a to 57a of the Appendix to this petition. The court's order reflecting this disposition appears at p. 58a.

The district court's judgment upon a jury verdict for the respondent appears at p. 59a of the Appendix to this petition.

The district court's opinion denying petitioner's motion for judgment as a matter of law upon liability and alternative motion for a new trial appears at pp. 60a to 63a of the Appendix to this petition. The court's order reflecting this disposition appears at p. 64a.

The court of appeals' opinion (per Sargus, D.J., sitting by designation, joined by Boggs, C.J. and Gilman, J.) appears at pp. 1a to 30a of the Appendix to this Petition.

The court of appeals' order denying rehearing and rehearing en banc appears at p. 67a of the Appendix to this petition.

The court of appeals' order dismissing respondent's cross-appeal appears at pp. 65a-66a of the Appendix to this petition.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion in this case on February 11, 2005, and denied rehearing and rehearing en banc on April 25, 2005. Petitioners invoke this court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

29 United States Code §623(a)(1) and (2)

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals age [40 years and older];

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age [40 years and older].

29 United States Code §623(f)(1)

[An employer may] . . . take an action otherwise prohibited . . . where the differentiation is based upon reasonable factors other than age.

Kentucky Revised Statutes §344.020(1)(a)

The general purposes of this chapter are:

To provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964 as amended (78 Stat. 241). Title VIII of the Federal Civil Rights Act of 1968 (82 Stat. 81), the Fair Housing Act as amended (42 U.S.C. 360), the Federal Age Discrimination in Employment Act of 1967 (81 Stat. 602), the Americans with Disabilities Act of 1990 (P.L. 101-336), and the Civil Rights Act of 1991 as amended (P.L. 102-166, amended by P.L. 102-392);

Kentucky Revised Statutes §344.040(1) and (2)

It is an unlawful practice for an employer:

(1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking;

(2) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual's race, color, religion, national origin, sex, or age forty (40) and over, because the person is a qualified individual with a disability, or

because the individual is a smoker or non-smoker, as long as the person complies with any workplace policy concerning smoking.

STATEMENT OF THE CASE

Substantive Facts

Effective June 11, 1999, Roller Bearing Corporation of America purchased the tapered bearing division of SKF, USA, Inc. located in Glasgow, Kentucky. Roller Bearing Corporation then invested the operation of the facility to its newly created subsidiary corporation, Tyson Bearing Company, Inc., which is the respondent to this petition.

Tyson's first day of operations at the Glasgow facility was June 14, 1999. At that time, almost each and every former hourly employee of SKF, USA, Inc.'s tapered roller bearing corporation became an active employee of Tyson. There were 226 of them. Another three former SKF employees were on medical leave and 32 were on lay-off status (Appendix for the Court of Appeals, pp. 197-204).

Both SKF and Tyson were parties to a collective bargaining agreement with Local 7641 of the United Steelworkers of America, AFL-CIO. SKF and the union had negotiated a three-year contract early in 1999. Tyson's parent company, Roller Bearing Corporation, agreed to honor this contract and agreed to an almost identical version of it with Local 7641 within several months of SKF's agreement with the Union.

Both contracts set forth a scale of wages from $13.40 to $15.24 per hour. The only exception to this wage scale in